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In the Supreme Court of the United States

OCTOBER TERM, 1997

CAL-ALMOND, INC., CARLSON FARMS, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., AND FRAZIER NUT FARMS, INC.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On remand from this Court after the decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), the Ninth Circuit ordered dismissal of petitioners' First Amendment claim without briefing, argument, or a written opinion, despite the fact that both the Ninth Circuit and the Solicitor General had previously acknowledged that petitioners' claim raises issues different from those resolved in *Wileman Bros.* The issue presented is:

Whether a federal agricultural marketing order that confers or withholds a credit against a monetary assessment on the basis of the content of a handler's own brand advertising violates the First Amendment.

RULE 29.6 STATEMENT

None of the petitioners has any parent or subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, four producers and handlers of California almonds, petition for a writ of certiorari to review the summary dismissal of their First Amendment claim by the United States Court of Appeals for the Ninth Circuit. At a minimum, we respectfully request that the Court vacate the order below and remand with instructions to entertain briefing and argument on the features of the statutory scheme that distinguish this case from *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

OPINIONS BELOW

The order of the court of appeals (App. A)[1] on remand from this Court (117 S. Ct. 2501), directing the district court to dismiss petitioners' First Amendment claim, is unreported.

The prior opinion of the court of appeals concerning remedial issues (App. B) is reported at 67 F.3d 874. The order of the district court (App. C) and the judgment of the district court concerning remedial issues (App. D) are unreported.

The initial opinion of the court of appeals (App. E), which addressed the First Amendment question presented herein and remanded the case to the district court for further proceedings on remedial issues, is reported at 14 F.3d 429. None of the four district court orders that were the subject of the initial court of appeals opinion (Apps. F, G, H, and I) are officially reported. Three of those orders (Apps. F, G, and H) are published, however, at 51 Agric. Dec. 44, 85, and 79 (respectively).

The opinions of the Judicial Officer of the Department of Agriculture (Apps. J, K, and L) are reported at 50 Agric.

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[1] References to "App." are to the separately bound volume of the appendix to the petition in this case. Citations to "R." refer to the reporter's transcript in the record compiled below.

Dec. 23, 171, and 183 (respectively).

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1997. A timely petition for rehearing was denied on March 3, 1998 (App. M). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 (Act) are 7 U.S.C. §§ 608a(6), 608c(1)-(4), (6), (7) and (15), and 610(b) and (c). They are reproduced at App. N.

The relevant regulations implementing the Act are 7 C.F.R. §§ 981.30, 981.38, 981.39, 981.40(a), (d) and (e), 981.41, 981.80, 981.81(a), and 981.441 (1992). They are reproduced at App. O.

STATEMENT

A. Advertising Provisions in Federal Marketing Orders

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*, as amended, authorizes (among other things) compulsory advertising programs for certain named commodities, administered by industry committees (*id.* §§ 608c(7)(C), 610) and paid by assessments imposed on all handlers of the particular commodities (*id.* § 610(b)(2)(ii)). These advertising programs are of two different types, as set forth in two different subsections of the Code of Federal Regulations for each marketing order adopted by the Secretary of Agriculture (Secretary). The first type, see, *e.g.*, 7 C.F.R. § 981.41, is a mandatory program in which all

handlers pay assessments to their industry boards, which use those assessments to produce and disseminate generic advertising promoting the covered products. This type of program was upheld by the Court last Term in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

The second type, see, *e.g.*, 7 C.F.R. § 981.441, allows handlers a choice: they may either advertise their own products in accordance with restrictions specified by regulations adopted by the Secretary and applied by the industry board, in which case they receive a total or partial credit against their assessments, or they may pay the full assessment to the Board for generic product advertising just as under the mandatory assessment program. The criteria for creditability are content-based and highly restrictive.[2]

This case involves the second type of program. The marketing orders at issue in *Wileman Bros.* were of the first type and did not include any credits or penalties based on the handlers' own brand advertising. For both types, the marketing orders are administered by boards made up of members of the industry appointed by the Secretary. 7 U.S.C. §§ 608c(7)(C), 610.

B. The Almond Marketing Order

Petitioners Cal-Almond, Inc., Saulsbury Orchards and Almond Processing, Inc., Carlson Farms, and Frazier Nut Farms, Inc. are "handlers" of California almonds, and as such are subject to the marketing order for California almonds, 7 C.F.R. § 981 (Almond Marketing Order or Order).[3] Their business consists almost entirely of processing

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[2] The criteria applicable to petitioners' advertising are discussed in detail at pages 5-6, *infra*.

[3] We cite to the Almond Marketing Order in effect for the crop years at issue in this case (1980-1981 to 1991-1992), which was (continued...)

and selling almonds for use as ingredients in such products as candy, ice cream, or cereal. App. 39a. As the Ninth Circuit noted in its initial opinion in this case, a single competitor, Blue Diamond, "overwhelmingly dominates the retail market" for almonds (App. 50a-51a); indeed, Blue Diamond, which sells under its brand name, has a 92% market share of almonds sold in grocery stores. App. 51a n.9. The Almond Marketing Order is administered by the California Almond Board (Almond Board or Board), which "has ten members, all of whom are industry representatives appointed by the Secretary." App. 40a. Because of its size, Blue Diamond holds a majority of the ten seats on the Almond Board, and thus controls the Board.[4] R. 135-139; App. 165a.

Like the agricultural marketing orders in *Wileman Bros.*, the Almond Marketing Order authorizes the Board to "fund[] a generic pro-almond public relations program." App. 40a; see Act of Nov. 25, 1970, Pub. L. No. 91-552, §§ 1(1) and (2), 84 Stat. 1357. Unlike the marketing orders at issue in *Wileman Bros.*, however, the marketing order for almonds authorizes a handler to receive a credit against its assessment for amounts it spends in purchasing its own advertising, up to the amount of the assessment used for paid advertising. 7 U.S.C. § 608c(6)(I); 7 C.F.R. § 981.41(c). Under this scheme, as it existed for crops years 1980-1981 through

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(...continued)
codified at 7 C.F.R. Pt. 981 (1992) (App. 368a-380a), unless otherwise noted.

[4] The Almond Marketing Order guarantees Blue Diamond, in its capacity as agricultural cooperative, four seats on the Board regardless of the tonnage it handles, and six seats if it handles more than 50% of all California almonds, 7 C.F.R. § 981.30, which it did during the crop years at issue (App. 165a). In *Wileman Bros.*, no single handler controlled its industry's board.

1991-1992, which are at issue in this case (see note 3, *supra*), a handler could receive credit for advertising its own brand, as well as for generic advertising.[5] 7 C.F.R. §§ 981.41(c), 981.441(c)(3)(i)(A) and (B).

To earn credit, however, the advertising had to satisfy the extensive requirements of the creditable advertising regulations, 7 C.F.R. § 981.441. The Board alone determined whether a handler's advertising satisfied the regulations and was creditable against its mandatory assessment. App. 40a-41a. Under the creditable advertising regulations, "[t]he clear and evident purpose of each advertisement" had to be "to promote the sale, consumption, or use of California almonds." 7 C.F.R. § 981.441(c)(2).

More significantly, the regulations provided that no credit was available for advertising that referred to "more than two complementary branded products"; for advertising that promoted "noncomplementary" products or "competing nuts"; or for advertising that "direct[ed] consumers to one or more named retail outlets" not operated by the handler. 7 C.F.R. § 981.441(c)(5). In addition, under 7 C.F.R. § 981.441(c)(3)(iv):

> When almond products, other than almond butter, are advertised, the credit shall be 50 percent of the total allowable payment to the advertising medium or 50 percent of the handler's payment thereof, whichever is less: *Provided*, That (A) the almond product does not contain nuts other than almonds, (B) the almond product contains at least 50% raw shelled almonds by weight, and (C) the almond product displays the handlers' brand.

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[5] Almost all of the assessment imposed by the Board was attributable to the creditable advertising program. The overall assessment on almond handlers was 2.6 cents per pound, and the maximum credit for advertising was 2.5 cents per pound. App. 40a n.1.

The effect of these restrictions was to allow handlers to receive a credit for advertising almonds for retail to consumers but to disallow credits for advertising almonds as ingredients. Under these regulations, for example, petitioner Cal-Almond, Inc., whose domestic sales are almost all for use in ice cream (App. 50a), could not receive credit for its advertising because almonds do not make up 50% of the net weight of the package of ice cream. 7 C.F.R. § 981.441(c)(3)(iv). Similarly, petitioner Saulsbury, which sells almonds to cereal companies, could not receive credit for promoting such cereals (App. 50a). Like Cal-Almond, Saulsbury was forced to pay the entire assessment, which the Board then used to promote retail almond sales, from which Saulsbury received no benefit.

By contrast, Blue Diamond (which controls the Almond Board) could obtain full credit for advertising its own brand, and then benefit a second time when the Board used the assessments paid by producers of ingredient almonds to run "generic" ads promoting the retail sales of almonds for consumption — where Blue Diamond has a 92% market share. As the Ninth Circuit stated, "there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as [petitioners], who sell primary to ingredient manufacturers." App. 53a.[6]

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[6] By the same token, Blue Diamond is the only almond producer that owns its own retail stores, and thus the only producer that can receive credits for advertising directing consumers to retail stores. When petitioner Saulsbury ran advertisements directing consumers to a chain of mini-markets, which sold its almonds in Boise, Idaho, it could not receive credit. App. 50a.

C. The Proceedings Before *Wileman Bros.*

This case arose from administrative petitions filed with the Secretary by petitioners under 7 U.S.C. § 608c(15)(A), which permits handlers to ask the Secretary to modify, or exempt them from, marketing orders that are "not in accordance with law." Petitioners alleged, among other things, that the generic and creditable advertising programs for California almonds violated the First Amendment. App. 162a, 219a-221a.

Upon review of the decisions on the petitions by an administrative law judge, the Judicial Officer of the Department of Agriculture (JO) rejected petitioners' First Amendment challenge. App. 219a-225a, 315a-318a. Petitioners sought review of the JO's decisions in the United States District Court for the Eastern District of California, pursuant to 7 U.S.C. § 608c(15)(B). The district court affirmed the JO's decisions. App. 72a-112a, 113a-139a, 140a-147a.

On appeal to the Ninth Circuit, the court reversed in relevant part, holding that both the generic and the creditable advertising programs for California almonds violate the First Amendment. App. 38a-71a.[7] The first question addressed by the court was whether the marketing order "even implicate[s], let alone violate[s], appellant's First Amendment rights." App. 42a. In addressing that question, the court separately analyzed the mandatory assessment program and the creditable advertising program, and although it ultimately concluded that both types of program infringe handlers' First Amendment rights, the reasoning and analysis applicable to each were different.

The Ninth Circuit found that the mandatory assessment program implicated First Amendment rights against compelled

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[7] The court of appeals rejected other challenges by petitioners to the administration of the Almond Marketing Order (App. 53a-70a).

speech and association, reasoning that "'where the government requires *a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.*" App. 43a (emphasis in original), quoting *United States* v. *Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). As to the creditable advertising program, the Ninth Circuit reasoned that it "also would clearly implicate appellants' First Amendment rights, both because it would compel them to speak and because it would impose content-based restrictions on that speech." App. 44a. Neither of those constitutional problems is applicable to mandatory assessment programs — such as those upheld in *Wileman Bros.* — since those programs neither "require[] [handlers] themselves to speak" (117 S. Ct. at 2139) nor treat handlers differently on the basis of the content of their own speech.

Having concluded that, for different reasons, both mandatory assessment programs and creditable advertising programs implicate the freedom of speech, the court of appeals analyzed the programs under the three-part standard for commercial speech regulations articulated in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). While the court concluded that both types of advertising programs are unconstitutional, its analysis distinguished between the programs in several respects. For example, the court considered it "a more difficult question" whether the "entire assessment-funded almond promotion program" (as distinguished from the creditable advertising provisions) directly advanced the government's interest in promoting almond consumption (App. 51a), and its holding that the program was more extensive than necessary to further the governmental interest was based in large part on its determination that a number of the onerous restrictions on creditable advertising were unjustified (App. 53a).

The court of appeals remanded the case to the district

court for further proceedings on the appropriate remedy. App. 70a-71a. The Secretary did not seek review by this Court of the court of appeal's decision. See U.S. Pet'n for Cert., *United States Dep't of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879, at 11 (filed May 1996).

On remand, the district court ordered the government to pay petitioners approximately $4.3 million. App. 34a-37a. The court of appeals affirmed in part and reversed in part. App. 2a-14a. It reversed the order requiring the government to reimburse petitioners for their payments to third parties for creditable advertising on the ground of sovereign immunity. App. 4a-8a. The court of appeals affirmed both the district court's order of a refund to petitioners of monies they paid to the Board or into escrow and the district court's refusal to reduce the amount of the refund to take into account the alleged benefit that petitioners had received from the generic advertising purchased with their assessments. App. 8a-10a.

D. The Intervening *Wileman Bros.* Decisions

In another Ninth Circuit case, decided after the initial decision by the court of appeals in this case but before the panel's second decision on remedies, handlers of California peaches, nectarines, and plums made a First Amendment challenge to the advertising programs established under the AMAA marketing orders for those commodities. These programs were of the mandatory assessment type; they did not involve creditable advertising and thus did not entail any content-based regulation of handlers' own advertising. The Ninth Circuit sustained the challenge, finding the case "largely governed by *Cal-Almond*." *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367, 1377 (1995).

The Solicitor General filed a petition for a writ of certiorari to review the Ninth Circuit's ruling on the First Amendment issue in *Wileman Bros.* U.S. Pet'n for Cert., *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184 (filed Jan. 1996). While that petition was still pending, and

after the Ninth Circuit issued its decision on remedies in this case, he filed a petition for certiorari in this case, asking the Court to hold the petition and dispose of it in light of the Court's disposition of *Wileman Bros.* See U.S. Pet'n for Cert., *United States Dep't of Agriculture* v. *Cal-Almond, Inc.*, at 11. The petition in this case did not raise the creditable advertising issue decided by the Ninth Circuit. *Id.* at I (stating the sole question presented as whether the First Amendment proscribes a program "to require the handlers of California almonds to fund a generic advertising program for that commodity").

This Court granted the petition in *Wileman Bros.* and reversed the Ninth Circuit, holding that the mandatory assessment program does not violate handlers' free speech rights. The Court emphasized three points:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

117 S. Ct. at 2138 (footnotes omitted).

The Court then granted the Solicitor General's petition in this case, vacated the Ninth Circuit's decision, and remanded for further consideration in light of the decision in *Wileman Bros.* 117 S. Ct. 2501 (1997).

E. The Proceedings on Remand

Before the court of appeals had received any motions or briefs from the parties addressing the distinctions between the *Wileman Bros.* decision and the instant case, it issued an order, stating in its entirety: "This case is REMANDED to the district court with instructions to dismiss Cal-Almond's First Amendment claim. *See Glickman* v. *Wileman Bros. & Elliot, Inc.*" App. 1a. Petitioners filed a petition for

rehearing and suggestion for rehearing *en banc*, which, after calling for a response from the government, the court of appeals denied. App. 356a.

REASONS FOR GRANTING THE PETITION

Petitioners return to this Court for relief after a brief, and ultimately empty, remand to the Ninth Circuit following this Court's decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). This case presents a constitutional question not raised or addressed by *Wileman Bros.*: whether a federal agricultural marketing order that bases the amount of the assessment that must be paid by handlers of a commodity on the content of each handlers' own brand advertising violates the First Amendment.

In *Wileman Bros.*, this Court held that the Free Speech Clause of the First Amendment is not implicated by a program in which handlers of agricultural commodities are required to pay an assessment to an industry board for the purpose of disseminating generic advertising. Essential to that holding was the Court's conclusion that the marketing orders "impose no restraint on the freedom of any producer to communicate any message to any audience." *Id.* at 2138. While that reasoning may be sufficient to dispose of any challenge to some agricultural marketing orders, it is inapplicable to the creditable advertising provisions in this case, which unmistakably impose a restraint on the freedom of almond handlers to communicate messages of their choice by penalizing some messages and rewarding others, on the basis of their content.

Both the Ninth Circuit in its previous opinion (App. 42a-53a) and the Solicitor General in his certiorari petition in this case (at 13-14) have acknowledged that the creditable advertising provisions raise constitutional issues different from those raised by the mandatory advertising assessments in *Wileman Bros.* Nonetheless, after remand from this Court for reconsideration in light of *Wileman Bros.*, the court of

appeals summarily entered an order directing the district court to dismiss petitioners' First Amendment claim — without briefing, argument, or an opinion. Evidently, the panel that summarily dismissed petitioners' case assumed that creditable advertising programs are constitutionally indistinguishable from compelled advertising assessment programs — and gave petitioners no opportunity to explain why the two types of programs are different.

Petitioners now seek review of the Ninth Circuit's decision on the constitutionality of the creditable advertising program. At a minimum, petitioners request that this Court vacate the decision below and remand the case again to the Ninth Circuit with instructions to give serious consideration to the important constitutional question raised in this case.

1. The First Amendment issue presented here is fundamentally different from the issue resolved in *Wileman Bros.* Indeed, far from supporting the Ninth Circuit's dismissal of petitioners' claims in this case, the reasoning of *Wileman Bros.* confirms that the creditable advertising program at issue in this case violates the First Amendment.[8] The mandatory assessment program upheld in *Wileman Bros.* had no effect on the handlers' own speech. The handlers simply paid into a fund, which was used to advertise equally all products. The program involved no scrutiny of the handlers' own speech; it offered neither incentive for speaking in one way nor disincentive for speaking in another.

By contrast, the creditable advertising program at issue here is a system of rewards and penalties based on the content of the handlers' own speech. If their advertisements pass muster in the eyes of the Almond Board, handlers receive

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[8] The analysis of the four dissenting Justices in *Wileman Bros.* would apply with even greater force to the creditable advertising program. See 117 S. Ct. at 2142 (Souter, J., dissenting); *id.* at 2155 (Thomas, J., dissenting).

almost a dollar-for-dollar credit against their assessment, up to the portion of the assessment designated by the Board for paid advertising — which is the lion's share of the overall assessment, see note 5, *supra*. If their advertisements do not meet with the Board's approval, they have to pay the assessment. The program thus constitutes both a compulsion to speak and a content-based judgment on what they say, backed up by financial rewards and penalties.

In *Wileman Bros.*, the Court held that three characteristics of the mandatory assessment program distinguish it from laws that abridge the freedom of speech:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

117 S. Ct. at 2138 (footnotes omitted). Under the first two of these three criteria, the creditable advertising program violates the freedom of speech. First, the creditable advertising program *does* impose a restraint on the freedom of the producer to communicate the message of his choice to the public: some messages will entitle the producer to a monetary credit and other messages will force the producer to pay the full assessment. See *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 469 (1995) (denial of financial "incentive" for speech "imposes a significant burden on expressive activit[ies]"). In *Wileman Bros.*, the assessment that must be paid was wholly unaffected by the handler's own speech; in this case, the amount the handler must pay is determined largely by the content of his speech. Second, the creditable advertising program *does* compel handlers to engage in actual speech, on penalty of payment of an assessment to the Almond Board. In *Wileman Bros.*, handlers had to pay their full assessment whether they

engaged in their own advertising or not. In this case, the program imposes the functional equivalent of a fine or an additional tax on handlers who do not advertise or do not advertise in the manner dictated by the Secretary and the Blue Diamond-controlled Board.

Moreover, the creditable advertising program involves content-based scrutiny of private speech by a government entity — a feature wholly absent from *Wileman Bros.* Discrimination on the basis of the content of speech is an evil at the core of the First Amendment's protections. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc.* v. *Member of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); see *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641-647 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-382 (1992). To make matters worse, these content-based restrictions are administered by a non-neutral decisionmaker — a Board dominated by one company, Blue Diamond, whose interests are diametrically opposed to those of petitioners. App. 165a; R. 135-139. To vest the power to exercise subjective judgments about the content of private speech in a board dominated by a competitor violates fundamental principles of freedom of speech. Cf. *Air Line Pilots Ass'n* v. *Miller*, No. 97-428, 1998 U.S. LEXIS 3403, at *20 (U.S. May 26, 1998) (noting that *Central Hudson* requires "'an impartial decisionmaker'"); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130-136 (1992); *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 307 (1986).

The distinctions between this case and *Wileman Bros.* thus go to the heart of First Amendment doctrine.

Both the Ninth Circuit and the Solicitor General have, in the past, acknowledged the differences between the constitutional issues in the two cases. The initial decision of the court of appeals in this case separately analyzed the First

Amendment implications of the mandatory assessment and creditable advertising programs, and based its conclusion that they implicate free speech concerns on different reasoning. See pages 5-7, *supra*. Then, in applying the *Central Hudson* test, the court of appeals identified several respects in which the two types of advertising program differ for constitutional purposes. App. 41a-53a.

Similarly, the Solicitor General acknowledged these differences. In his petition for certiorari in this case, the Solicitor General urged the Court to decide *Wileman Bros.* on the merits and to hold the petition in this case. The petition explained:

> [T]he Ninth Circuit's decision on the First Amendment issue in this case turned in part on certain aspects of the creditable advertising regulation then in effect. In particular, the court determined that the regulation was overly restrictive with respect to the types of advertising for which handlers could receive credit. That determination, in turn, was based in part on the court's views as to certain features of the almond market, such as distribution patterns and end uses for almonds.[9] The court's determination that the creditable advertising regulation was overly restrictive, in light of the manner in which almonds were marketed, affected the court's analysis of the generic advertising program under both the "directly advances" and the "no more extensive than necessary" parts of the *Central Hudson* test.

Pet'n for Cert., at 13-14 (footnotes omitted). See also *id.* at 15 (stating that in this case, unlike in *Wileman Bros.*, the

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[9] This apparently was the Solicitor General's euphemistic reference to the court's finding that the sole logic behind the restrictions was to benefit Blue Diamond, which holds a near monopoly on retail almonds, at the expense of ingredient almond handlers. See App. 51a.

Ninth Circuit "reli[ed] * * * on the former creditable advertising regulation in the marketing order for California almonds and on certain features of the market for California almonds"). Of course, if those features distinguished this case from *Wileman Bros.* when the Secretary was petitioning, then those same factors distinguish this case from *Wileman Bros.* now. With all respect, the Solicitor General should be deemed estopped from arguing now that the cases are indistinguishable. See *Steagald* v. *United States*, 451 U.S. 204, 208-211 (1981).

Once the content-based restrictions on creditable advertising are subjected to scrutiny under the *Central Hudson* test, it is exceedingly improbable that they could be upheld.[10] As the court of appeals discovered in its initial examination of this question, the restrictions have "no logical justification" other than "to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as [petitioners], who sell primarily to ingredient manufacturers." App. 53a. Blue Diamond has a near-monopoly (92% market share) on retail almond sales (App. 51a n.9), as well as control over the Almond Board. As a result of the carefully-crafted content restrictions on creditable advertising, Blue Diamond can advertise its own brand and its own retail stores, and receive full credit against its assessment, while petitioners, who produce ingredient almonds, are denied credit for advertising their own products. On the other hand, when they pay the assessment, it is used to advertise retail almonds, which is Blue Diamond's product. App. 53a. Heads I win, tails you lose.

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[10] This Court did not reach the *Central Hudson* question on its review of the mandatory assessment program in *Wileman Bros.* The Ninth Circuit, however, held that the program did not pass the *Central Hudson* test, and the four dissenting Justices in *Wileman Bros.* would reach the same result. See 117 S. Ct. at 2149-2153 (Souter, J., dissenting); *id.* at 2155 (Thomas, J., dissenting).

This biased program grossly exacerbates the considerable problems with creditable advertising schemes already acknowledged by the government. In his brief in *Wileman Bros.*, the Solicitor General stated that under a creditable advertising program, "individual handlers would have little interest in participating in collective efforts to promote increased overall consumption of a commodity. Instead, there would be a strong incentive for each individual handler to tailor its own advertising to inure to its benefit." U.S. Br., *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184, at 46 (filed July 1996). This analysis was adopted by the Court in *Wileman Bros.*, 117 S. Ct. at 2141:

> the potential benefits of individual advertising do not bear on the question whether generic advertising directly advances the statute's collectivist goals. Independent advertising would be primarily motivated by the individual competitor's interest in maximizing its own sales, rather than in increasing the overall consumption of a particular commodity.

In this case, the almond creditable advertising program is designed to benefit only Blue Diamond. And, as the government noted in *Wileman Bros.* (U.S. Br. at 46.), this type of program "jeopardize[s] the government's ability to achieve any of its stated interest" in agricultural marketing orders.

Moreover, the issue is of considerable importance. The AMAA authorizes the Secretary to allow credits for individually purchased advertising by handlers of various agricultural commodities regulated under the Act, including, in addition to almonds, filberts, raisins, walnuts, olives, and Florida Indian River grapefruit. 7 U.S.C. § 608c(6)(I). Acting on this statutory authority, the Secretary has adopted several creditable advertising regulations. See, *e.g.*, 7 C.F.R. § 932.45(a)(2) (California olives); § 982.58(b) (filberts and hazelnuts from Oregon and Washington); and § 989.53(b)

(California raisins).[11]

Finally, although the Ninth Circuit's order in this case is unpublished, it will have a broad effect on a number of constitutional challenges to creditable advertising regulations pending in the courts below. Indeed, the government has cited the court of appeals' order on remand from this Court in support of its motions to dismiss pending constitutional challenges to creditable advertising programs.[12] See U.S. Mem., *Cal-Almond, Inc.* v. *U.S. Dep't of Agriculture*, No. CV-F-98-5049, at 1 (E.D. Cal.) (filed May 4, 1998) (relying on and attaching a copy of the Ninth Circuit's order in this case in seeking dismissal of a challenge to "essentially the identical promotion program"); U.S. Mem., *United States* v. *Cal-Almond, Inc.*, No. CV-F-94-5985, at 3-4 and n. 1 (E.D. Cal.) (filed May 4, 1998) (citing the Ninth Circuit's order in this case for the proposition that the "*constitutionality* of the Almond Order promotion and advertising program is well-settled") (emphasis in original). Since the creditable advertising programs happen to involve marketing orders that operate

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[11] Since the initial decision by the Ninth Circuit in this case, the restrictions on creditable advertising by California almond producers have been modified in some respects, see 7 C.F.R. § 981.441 (1998), but the changes did not eliminate the serious constitutional defects identified in this case. Indeed, the new regulations are indistinguishable from a constitutional perspective, and have at least as onerous an effect on petitioners. For example, the regulations severely limit a handler's advertising for products in which almonds are an ingredient. 7 C.F.R. § 981.441(e)(4)(iv) (1998). If, however, this Court were to conclude that the regulatory modifications affect the certworthiness of the case, this would be a reason to remand to the Ninth Circuit; it would not be a reason to allow petitioners' First Amendment claim to be buried without fair consideration.

[12] Copies of the government's briefs in these cases have been lodged with the Clerk of the Court.

within the confines of the Ninth Circuit, there is a serious danger that this important constitutional question will be forever resolved without a full and fair opportunity for the victims of these outrageous programs to present their case.

For these reasons, the Court should grant review to resolve the First Amendment issues raised by the government's statutory authority to impose a creditable advertising program on agricultural commodities.

2. At a minimum, the Court should grant the petition, vacate the Ninth Circuit's dismissal order, and remand the case again for serious consideration in light *Wileman Bros.* Such consideration was contemplated by the Court's first remand order. The court of appeals' failure to engage in such consideration was fundamentally unfair to petitioners, and cannot be squared with this Court's instructions. If this case had arisen after *Wileman Bros.*, petitioners would have had the right to file briefs explaining why they should prevail under the reasoning of that case. In the actual procedural posture of this case, petitioners were, and are, entitled to no less.[13]

It appears that the court of appeals erroneously understood this Court's remand order as a judgment on the merits against petitioners. An order by this Court granting a petition, vacating a judgment, and remanding a case for reconsideration in light of an intervening decision by the Court "does not amount to a final determination on the merits." *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964); see *Lawrence* v. *Chater*, 516 U.S. 163 (1996) (GVR order does not

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[13] Petitioners were able to raise some of their arguments in their petition for rehearing *after the court of appeals had ordered dismissal of the case*, but this can hardly be treated as equivalent to an opportunity to file a brief on the merits. The rehearing petition, of necessity, was devoted to the question why the panel's order should be reheard, rather than to the constitutional issues involved.

represent a ruling on the merits). As noted in R. Stern, E. Gressman, S. Shapiro, and K. Geller, SUPREME COURT PRACTICE 250 (7th ed. 1993), longstanding precedents show that:

> the Court does not treat the summary reconsideration order as the functional equivalent of the summary reversal order, and that the lower court is being told to reconsider the entire case in light of the intervening precedent which may or may not compel a different result.

Here, the court of appeals summarily disposed of petitioners' substantial First Amendment claim, erroneously treating the remand from this Court as "the functional equivalent of [a] summary reversal." Another GVR order in this case would achieve many of the benefits identified by the Court in explaining this common practice (*Lawrence*, 516 U.S. at 167 (citation omitted)):

> In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the "potential for unequal treatment" that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

Thus, if the Court, contrary to our submission, decides that full plenary review of this case is not appropriate, the Court should nonetheless vacate the decision below and remand the case for full consideration of the merits of petitioners' constitutional claim. This would serve as an important signal to the lower courts that a remand from this Court with instructions to reconsider in light of a recent decision requires genuine reconsideration, and should not be treated as a summary disposition.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should vacate the order below and remand with instructions to receive briefing and argument on the relevance of *Wileman Bros.* to this case.

Respectfully submitted.

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